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No. 477

IN THE

Supreme Court of the United States

October Term, 1964

In the Matter of the Application
of
JOSEPH LEWIS AND ALFRED L. KLEIN,
Petitioners,

For an Order Against

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT COMMISSIONER OF EDUCATION

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent prays that the Writ of Certiorari sought herein be denied and in support of said prayer submits this Brief in Opposition.

Jurisdiction

Petitioners claim that jurisdiction is conferred on this Court by 28 U. S. C. § 1254 (3).

It is respectfully pointed out that the Writ of Certiorari here sought is *not sought to be directed to a United States Court of Appeals* (such as the United States Court of Appeals for the Second Circuit) but to the Court of Appeals of the State of New York as the highest state court of the State of New York.

There has not been, nor could there be, any certification of any question of law as to which instructions are desired.

It is submitted therefore that the Writ of Certiorari here sought cannot issue on the sole and only basis on which it is sought by petitioners.

Questions Presented

1. Whether a proceeding under Article 78 of the New York State Civil Practice Act and Civil Practice Law and Rules, in the nature of mandamus, is available:

   a. Where respondent has *not* "failed to perform a duty enjoined upon [him] by law."

      (This question was *determined in favor of respondent* by Mr Justice BOOKSTEIN at New York Supreme Court, Special Term—see Appendix, pp. 7 and 9 of petition for Writ of Certiorari; the Appellate Division, Third Judicial Department, *did not determine the question*—see Appendix, p. 17 of petition; the Court of Appeals affirmed without opinion.)

   b. Where no demand was made for the revocation or rescission of the action complained of, and where the jurisdictional four-month limitation of the right to institute such a proceeding had long since expired.

(This question was *determined in favor of respondent* by Special Term—see Appendix, p. 7 of petition herein, but *was not determined* by the Appellate Division—see Appendix, p. 17 of petition.)

2. Whether a proceeding under Article 78, or any proceeding, is available where the questions raised are *entirely academic,* in that the action complained of is entirely in the nature of a recommendation and in that the record does not contain any allegation that said recommendation has been adopted by any school district.

(This question was not determined by Special Term but this aspect of the case was recognized by the Appellate Division—see Appendix, p. 20 of petition therein—and was obviously at least in part a basis for the determination of both that Court and the Court of Appeals.)

3. *Whether petitioners have standing to sue,* where the petition before the state court does not indicate that petitioners' children are actually subjected to the results of the action complained of, and where furthermore there is no evidence whatever in the record that petitioners' children are presently still in school, and if so, whether they are subjected to the results of said action.

(This question was not determined by the courts below.)

4. Whether the action of respondent in obeying a statutory duty and in so doing, obeying an Act of Congress, violated the provisions of the First Amendment to the United States Constitution.

(All courts below determined this question in favor of respondent.)

5. Whether the determination of the New York State Court of Appeals conflicts with the decisions of this Court, particularly in *Engel* (370 U. S. 421) and *Schempp* (374 U. S. 203).

(It is true that the decisions of Special Term and the Appellate Division were rendered prior to the decisions of this Court in *Engel* and *Schempp*, but the decision of the Court of Appeals was rendered well after said decisions had been handed down; said decisions were in fact extensively briefed before the Court of Appeals; the Court of Appeals determined this question in favor of respondent.)

Statutes Involved

The pertinent statutory and constitutional provisions are the following:

1. The following portion of the First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *".

2. The following portions of the Declaration of Independence:

> "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happi-

ness." * * * "and for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lifes, our Fortunes and our sacred Honor."

3. The Preamble to the Constitution of the State of New York:

"We, the People, of the State of New York, grateful to Almighty God, for our Freedom, in order to secure its blessings, Do Establish This Constitution."

4. Education Law, Sections 801 and 802:

"§ 801. Courses of instruction in patriotism and citizenship and in the constitution of the United States.

1. In order to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, the regents of The University of the State of New York shall prescribe courses of instruction in patriotism and citizenship, to be maintained and followed in all the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, over the age of eight years, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools over eight years of age shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools of the city or district in which such pupils reside.

2. The regents shall prescribe courses of instruction in the history and meaning of the provisions of the constitution of the United States, to be main-

tained and followed in all of the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, in the eighth and higher grades, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools in grades or classes corresponding to the instruction in the eighth and higher grades of the public schools shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils in the public schools of the city or district in which such pupils reside.

3. The regents shall determine the subjects to be included in such courses of instruction in patriotism and citizenship and in the history and meaning of the provisions of the constitution of the United States, and the period of instruction in each of the grades in such subjects. They shall adopt rules providing for attendance upon such instruction and for such other matters as are required for carrying into effect the objects and purposes of this section. The commissioner of education shall be responsible for the enforcement of such section and shall cause to be inspected and supervise the instruction to be given in such subjects. The commissioner may, in his discretion, cause all or a portion of the public school money to be apportioned to a district or city to be withheld for failure of the school authorities of such district or city to provide instruction in such courses and to compel attendance upon such instruction, as herein prescribed, and for a noncompliance with the rules of the regents adopted as herein provided.

4. The regents shall designate a week during each year and prescribe a uniform course of exercises in the public schools of the state suitable for pupils of various ages to instill into the minds of such pupils

the purpose, meaning and importance of the bill of rights articles in the federal and state constitutions. Such exercises shall be in addition to any prescribed courses of study in the schools."

"§ 802. Instruction relating to the flag; holidays.

1. It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools.

2. It shall also be his duty to make special provisions for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day and Flag day, and such other legal holidays of like character as may be hereafter designated by law when the legislature makes an appropriation therefor.

3. Nothing herein contained shall be construed to authorize military instruction or drill in the public schools during school hours."

5. Education Law, Section 305, opening paragraph, subdivisions 1 and 2:

"§ 305. General powers and duties. The commissioner of education is hereby charged with the following powers and duties:

1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents.

2. He shall have general supervision over all schools and institutions which are subject to the provisions of this chapter, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school

officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control."

6. Civil Practice Law and Rules, Sections 217 and 7803:

"§ 217. Proceeding against body or officer; four months

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208, within two years after such time."

"§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

7. 36 U. S. C. § 172:

"§ 172. Pledge of allegiance to the flag; manner of delivery.

The following is designated as the pledge of allegiance to the flag: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.' Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing their headdress. Persons in uniform shall render the military salute."

8. Subdivision 5 of Section 150 of the Regulations of the Commissioner of Education:

"5. *Pledge to the flag.* It is recommended that schools use the following pledge to the flag:

'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all.'

In giving the pledge to the flag, the procedure is to render the pledge by standing with the right hand over the heart."

Statement

Title 36 of the United States Code deals with Patriotic Societies and Observances. Chapter 10 thereof covers Patriotic Customs. Section 172 of this chapter designates the text of the Pledge of Allegiance to the Flag, as well as the manner of its rendition. The text of the pledge, as contained in this section, was amended by an Act of Congress, June 14, 1954 (68 Stat. 249; Chapter 297), by adding the words "under God" after the word "Nation".

Section 802, subdivision 1, of the Education Law, for a great many years, had required the Commissioner of Education "to prepare, for the use of the public schools of the state, a program providing for a salute to the flag,

for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools". Regulations in response to this mandate had been in existence for a great many years, and were and are contained in Section 150 of the Regulations.

Shortly after the action of Congress the Commissioner of Education conformed the language of the Pledge of Allegiance, as contained in subdivision 5 of Section 150 of his Regulations, to this change in the United States Code.

The provision in the Commissioner's regulations merely *recommends* the use of the pledge as set forth in the United States Code. It does *not require* its use.

During 1956 a revision of the Flag Regulations for the New York State Schools was prepared and sent out. On page 6 of this pamphlet, Section 172 of the United States Code is quoted, and on page 10, subdivision 5 of Section 150 of the Regulations of the Commissioner of Education is also quoted. It was the distribution of this pamphlet which apparently caused petitioners to bring this proceeding, *two years after the event complained of.*

It will be noted that no school district is made a party to this proceeding, as having adopted the said recommendation and actually using the same in some manner, so that no facts as to the effect of said recommendation are before the Court.

It will be noted further that the amendment to the Regulations was made in *1954* and that the original petition herein was not verified until September 10, *1956.*

It will be noted finally that no demand was made by petitioners on respondent for discontinuance or repeal of the amendment to the Regulations.

Mr. Justice Bookstein dismissed the petition upon a lengthy opinion on the merits (Appendix, pp. 7-16 of petition herein), also noting that no "demand or request for revocation or rescission" was made "prior to the commencement of this proceeding". The Appellate Division, Third Judicial Department affirmed on the merits, but stated that "we do not determine" * * * "the procedural or other objections raised by respondent" (p. 17 of Appendix to petition).

The Court of Appeals affirmed unanimously, without opinion.

Reasons why Writ of Certiorari Should Not be Granted

1. The decision below *could have been* based entirely on good and sufficient non-federal grounds. This is so even though the Court of Appeals and the Appellate Division were content to rest their determinations on their decisions on the main issue. The Appellate Division stated:

> "None of the procedural or other objections raised by respondent seem to us to be vital but since we go directly to the merits, we do not determine them." (Appendix, p. 17 of petition.)

Thus, it is obvious that, if the Court of Appeals had agreed with petitioners on questions 4 and 5 (*supra*), the judgment itself would have had to go against petitioners, in accordance with well established rules of state law. As Mr. Justice Bookstein pointed out at Special Term (Appendix, pp. 7 and 9 of petition), it would have been necessary for

petitioners to establish that respondent had "failed to perform a duty enjoined upon [him] by law." This would have been impossible to do, since respondent followed a state statute and in so doing obeyed an Act of Congress and in order to establish this, in any event, petitioners would have had to allege and prove that a demand was made upon respondent for revocation or rescission of the action complained of. This they did not do (C. P. L. R. § 217).

2. *This entire proceeding is entirely academic.*

The action complained of consists entirely of a recommendation. There is no allegation that any school district actually adopted this recommendation. In fact, no school district is even made a party to this proceeding.

Here compare the proceeding in *Engel* (370 U. S. 421) where a school district was the respondent and the Board of Regents appeared merely as *amicus curiae* having made the recommendation for the use of the Regents Prayer. There it was the school district which had actually adopted and followed the recommendation and it was the children of petitioners in that case who had been subjected to such prayer.

Even further, if any school district had adopted the pledge as amended in 1954, it would still be necessary to show that such district had adopted that pledge as recommended by respondent, as distinguished from their adopting such pledge *directly from the United States Code* with which school district personnel may be as familiar as with the Commissioner's regulations. As the Appellate Division pointed out (Appendix, p. 20 of petition):

> "This proceeding, differing, from *Engel,* is not directed against a local or other school authority

which has actually required the recital of the pledge, but is addressed to a regulation purely recommendatory. We may not assume present or future action by some school authority to effectuate the Commissioner's recommendation by means recognized by the courts and by the Commissioner as deprivative of constitutional privilege. If and when that unlikely action shall occur, it may be dealt with, directly and specifically."

3. *Petitioners have no standing to sue in this proceeding.*

It is not alleged in the original petition in the state court that petitioners' children actually had to recite the pledge. In fact, petitioner Lewis does not allege to have children in school at all. While paragraphs 3 and 5 of such original petition allege that Alfred Klein's children are presently (1957) in attendance in the New York City School System, and that the recital of the pledge "has been the custom, tradition and regulation for the children in attendance at the public schools of this State", there is no allegation that his children were actually required to make such recital or that they were excused therefrom. If such had been the case, at that time it would have been easy enough for the petition so to allege.

In addition, however, it may well be doubtful that said children are still in school—eight years later. This, in turn, of course, raises the question which was before this Court in *Doremus* v. *Board of Education*, 342 U. S. 429, where the appeal to this Court was denied because the children in question had graduated from school and, consequently, the Court held (Justices Douglas, Reed, and Burton dissenting) that appellant had lost his justiciable interest in the matter.

Petitioners' lack of standing to sue rests "upon reasons deeply rooted in the Constitutional divisions of authority in our System of Government and the impropriety of judicial interpretation of law at the instance of those who show no more than a mere possible injury to the public."

Perkins v. *Lukens Steel Co.*, 310 U. S. 113, 132.

4. *Respondent's action did not violate the provisions of the First Amendment to the United States Constitution.*

Respondent obeyed a State law under which he must prepare a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be determined by him to be expedient.

In addition, as chief executive officer of the Board of Regents of the University of the State of New York he also must prescribe courses of instruction in patriotism and citizenship, in the history, meaning, significance and effect of the provisions of the Constitution of the United States, the amendments thereto, the Declaration of Independence, the Constitution of the State of New York and the amendments thereto.

In acquitting himself of these duties he obeyed, as he had to, the amendment made by the 1954 Act of Congress which added the words "under God" to the pledge of allegiance (36 U. S. C. § 172).

He cannot excise certain parts of the materials for the teaching of which he is responsible under statute and Act of Congress and teach only an expurgated version thereof. He cannot eliminate the words "under God" from the teaching of the Gettysburg Address and be true to the history of the United States, *i.e.* to his statutory duty.

5. *The decision of the Court of Appeals is not in conflict with the decision of this Court in Engel and Schempp.*

In the former case, this Court found that the Regents Prayer was a "religious exercise" (pp. 437 to 439, fn. on pp. 440, 442). It was there held that the Regents Prayer was "a part of a governmental program to further religious beliefs"; "part of the religious program carried on by government" (p. 425); "is a religious activity" (p. 424).

Thus, the question is posed as to the nature of the amended pledge of allegiance in the cause at bar. Is it a religious exercise, or is it something else?

The test according to Mr. Justice CLARK, writing for the Court in *Schempp*, on page 222 is as follows:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Or, in the words of the concurring opinion of Mr. Justice BRENNAN (pp. 294, 295):

> "What the Framers meant to foreclose, and what our decisions under the Establishment clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert reli-

> gious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not in my judgment be deemed to violate the Establishment Clause. Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for our society."

Measured by these tests, it is clear that the amended pledge of allegiance does not fall into the category of the impermissive. The addition of the words "under God" does not in the light of the history of this nation convert the Pledge of Allegiance into an "essentially religious exercise".

On the contrary, in the words of the majority opinion in *Schempp*, the Pledge of Allegiance is essentially used "as a reference for the teaching of secular subjects" (p. 224).

As Judge Dye pointed out in *Engel* (10 N. Y. 2d 191):

> "The Pledge of Allegiance was neither designed nor intended for other than a patriotic purpose."

Mr. Justice BRENNAN specifically refers to the recitation of the revised pledge in *Schempp* (374 U. S. 303, 304). He categorizes it among:

> "F. Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning.— * * * The truth is that we have simply interwoven [the motto 'In God We Trust'] * * * so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.
>
> "This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious

purpose or meaning. *The reference to divinity in the revised pledge of allegiance for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God'. Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.*" (Emphasis supplied.)

Again, specifically referring to the Pledge of Allegiance (pp. 280 and 281), Mr. Justice BRENNAN in discussing the propriety of "the use of religious means to achieve secular ends where non-religious means will suffice" says:

> "It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, *daily recitation of the Pledge of Allegiance*, or even the observance of a moment of reverent silence at the opening of class, *may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.*" (Emphasis supplied.)

Mr. Justice GOLDBERG perhaps best sums up respondent's position in his concurring opinion in *Schempp* (374 U. S. 307, 308):

> "And, of course, today's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause. As the Court declared only last Term in *Engel* v. *Vitale*, 370 U. S. 421, 435, n. 21:
>
> > 'There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the com-

> poser's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. *Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State * * * has sponsored in this instance.'*
>
> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." (Emphasis supplied.)

6. What petitioners are here seeking to accomplish is actually completely impossible. They wish to "protect" children of their persuasion from all exposure to the fact that the great majority of the citizens of this country have throughout its history acknowledged, and do now acknowledge the existence of a Divine Being. This fact is documented and manifested in a great many diverse ways. "In God we trust" appears on our coins. *How would petitioners prevent the little ones from noticing that inscription on the pennies and nickles they are given to buy candy or gum?* Officials and official bodies, such as the president of the United States, the Congress of the United States, all State Legislature and our courts, have continuously invoked the Deity before and after the transaction of official business. Christmas and Easter, as well as Sunday, are official holidays, as is Thanksgiving Day established by Presidential Proclamation. *How would petitioners prevent the little ones from noticing that there is a special significance to Christmas, to Easter, and to Sunday?* The oath used in judicial process and the Presidential Oath of Office are but a

further indication that the Supreme Being is part of the warp and woof of our national life. The United States Supreme Court itself starts all its sessions with such an invocation ("God save the United States and this Honorable Court"); "the mass of organic utterances proclaims that ours is a religious Nation" (143 U. S. 457)*; "We are a religious people whose institutions presuppose a supreme being" (343 U. S. 306)**. Petitioners refer to the *Everson* case (330 U. S. 1) but fail to add that in that case the court declared valid the transportation of pupils from and to religious schools.

The court there states on page 18: "State power is no more to be used as to handicap religions than it is to favor them". It is submitted that respondent's action neither handicaps nor favors any religion. It merely adds language which has long been part of our national heritage.

The New York State Education Law, Section 801 and other provisions thereof *require* that the great organic documents (listing specifically, among others, the Declaration of Independence) be taught in all the schools of the state, public and private. Lincoln's Gettysburg Address, which is one of the basic historic documents which must be taught as part of our national history and heritage, refers expressly to "this Nation under God".

Would petitioners have the Nation's schools teach our youth that Lincoln never said that? Or would they omit the Gettysburg Address altogether? To do so, would in the words of the Court of Appeals (10 N. Y. 2d 180), indeed "be in defiance of all American history".

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* *Church of the Holy Trinity* v. U. S.

** *Zorach* v. *Clauson.*

Both under the *Everson* case and the 1939 amendment to the New York State Constitution, transportation of pupils at public expense to religious schools is prevalent throughout the State, of which fact the children obviously are aware. The released time program has been held to be constitutional in the *Zorach* case (343 U. S. 306) and *pupils are aware of this when some of them leave for this purpose and later return. Children cannot help but notice the fact that churches and synagogues exist and people stream to them at certain times.*

Thus, it is obvious that the child at a very early age is bound to come in contact with the word and concept of God and their connection with our life, history and national heritage.

It is obviously impossible to eliminate this contact and knowledge from the child's life.

We would need to reissue all our coins, alter all historic and constitutional documents, all text books and falsify history in order to achieve such a result. It cannot be reasonably argued that petitioners are constitutionally entitled even to an attempt in this direction. *It is submitted that the addition of these words to the Pledge of Allegiance does not in any way alter the influences to which the growing young American is subjected.*

Petitioners' argument that teachers may be asked, because of this addition, to explain the nature and meaning of God, is merely speculation. If speculate we must, we may more reasonably assume that the question as to the nature of God will have been explained to the child long before he enters school and even if it hasn't, it is only reasonable to assume that any sensible teacher will refer the child to his parents for an answer.

7. The amended pledge merely acknowledges that, in the words of Justice CLARK in *Schempp* (374 U. S. 212):

> "It is true that religion has been closely identified with our history and government."

It also acknowledges that today (1962), as Justice CLARK further points out in *Schempp*, 97% of our population either have actual church membership or at least profess some religion or religious beliefs of one kind or another:

> "Indeed, only last year an official survey of the country indicated that 64% of our people have church membership, Bureau of Census, U. S. Department of Commerce Statistical Abstract of the United States, 48 (83d. ed. 1962), while less than 3% profess no religion whatever." *Id.*, at p. 46." (374 U. S. 213.)

In fact, an acknowledgment or invocation of the Supreme Power is contained in one form or another, in every state constitution in the United States, in the Declaration of Independence and in the Preamble to the Constitution of the United States.

While the rights of minorities of all kinds must, of course, be scrupulously respected and safeguarded, nevertheless, these basic facts of our national life and history cannot and should not be kept from the growing child. Thus, the use of the amended pledge, *if a school district indeed wished to adopt respondent's recommendation*,

> "merely recognize[s] the historical fact that our nation was believed to have been founded 'under God'. Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address which contains an allusion to the same historical fact." (374 U. S. 304; Emphasis supplied.)

Conclusion

For all the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari herein should be denied

Respectfully submitted,

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